

**ORIGINAL**

**Before the  
Federal Communications Commission  
Washington, D.C. 20054**

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In the Matter of )

)

Implementation of the )

CC Docket No. 96-98

Local Competition Provisions of the )

Telecommunications Act of 1996 )

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**REPLY COMMENTS OF  
MASSACHUSETTS ELECTRIC COMPANY  
THE NARRAGANSETT ELECTRIC COMPANY  
GRANITE STATE ELECTRIC COMPANY  
NEW ENGLAND POWER COMPANY  
NEES TRANSMISSION SERVICES, INC.  
ON ACCESS TO RIGHTS OF WAY**

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## EXECUTIVE SUMMARY

The NEES Companies encourage the FCC to consider the perspective of electric utility companies in determining whether, and how, to regulate access to rights-of-way, poles, and conduits, and the exceptions accorded to access to their facilities under the Telecommunications Act of 1996. In particular, the NEES Companies respond to the replies of other commenters with respect to notification of facility modifications to attaching entities; determination of available capacity by utilities; and access to facilities located on private easements.

Notifications to attaching entities regarding utility plans to modify facilities should be subject to negotiation between the parties. If the FCC nevertheless determines that it should regulate this aspect of access, the procedures governing such notification should be reasonable in time and manner, with exceptions for emergencies.

In determining whether a utility can make capacity available to attaching entities, the Commission should refrain from attempting to establish national requirements. Issues of sufficient capacity, safety, reliability, and engineering should be determined on a case-by-case basis. The FCC should recognize the role of the electric utilities' experience in safety matters, and responsibilities of the utilities to ratepayers.

Any FCC regulations of access to rights-of-way should also be consistent with real property and contract law, and the concerns of local communities. In particular, access to private easements should be limited in accordance with private contract rights and local law.

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NEES TRANSMISSION SERVICES, INC.  
REGARDING ACCESS TO RIGHTS-OF-WAY**

Several retail and wholesale electric utility companies within the New England Electric System, a public utility holding company (the "NEES Companies"),<sup>1</sup> submit these reply comments in accordance with Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") Rules and the FCC's *Notice of Proposed Rulemaking* ("NPRM") in the above-

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<sup>1</sup> The affected companies include Massachusetts Electric Company, The Narragansett Electric Company, and Granite State Electric Company -- retail electric companies; New England Power Company -- a wholesale electric generation and transmission company; and NEES Transmission Services, Inc. -- a newly-proposed subsidiary of the New England Electric System which, upon approval by the Federal Energy Regulatory Commission ("FERC") and the Securities and Exchange Commission ("SEC"), will provide transmission services over those facilities throughout the three-state service territories of the companies of the New England Electric System.

captioned proceeding. The NEES Companies offer an electric utility perspective for the Commission's consideration in this docket, and offer replies to comments directed to rules and policies for access to rights-of-way, including poles, ducts, and conduits by telecommunications service providers.

**I. Notifications to Attachers of Changes or Modifications in Utility Infrastructure Must Be Reasonable.**

Notifications from utilities to attaching entities that their attachments are to be modified should be subject to negotiations between the parties. However, if the FCC must establish rules governing such notifications, the rules should be reasonable in light of the realities of providing electric service to the public. The time period for notifications should be reasonable, and the requirement of notification and any limitations on performing modifications should allow exceptions for emergencies and state and local activities, as well as encourage, rather than hamper, local competition in telecommunications.

**A. The Time Period for Notice of Modifications to Attachments Must Be Reasonable.**

Several commenters have suggested specific notice requirements of up to 12 months for modifications of attachments. Notices of infrastructure changes or modifications are only one type of the many notices and communications required in the day-to-day administration of attachments and should be negotiated between the parties as one part of the total process of negotiating attachments.

If the FCC must specify a requirement, the NEES Companies believe that 30 days' notice of modification of an attachment, delivered in writing or by other mutually agreed means, is

adequate. The attaching entity would not be required to modify its attachment within the 30 days; the notification would only indicate an intent to modify the attachment and identify additional space or capacity requirements.

**B. Emergencies Should Not Fall Within Any Standard Notice Period.**

Unfortunately, electric utility facilities are subject to emergencies such as storms, poles hit by vehicles, and unplanned accidents such as dig-ins to ducts and conduits. Public safety requires utilities to respond in a timely manner to repair damage and restore electric service in these emergency situations. Immediate restoration of poles, ducts, conduits and rights-of-way during emergencies benefit all attaching parties. Hobbling restoration efforts by requiring notification before restoration can begin would slow restoration of services for all attached parties, including those entities which represent that they would benefit from a notice requirement.

**C. Notice of Changes to Infrastructure Must Accommodate State and Local Directives.**

Generally, utility facilities are located within state or locally controlled roads and must comply with applicable state and local requirements. The utility must comply with these requirements, whether or not the applicable regulations permit notice procedures, and whether or not these regulations require compliance activity more frequently than an attaching entity might plan for, or expect.

One commenter, for example, suggests that an owner should be prohibited from modifying its facilities "more than one time in any two year period"<sup>2</sup> Such a prohibition simply is not practicable, especially when a government body controlling the land on which the facilities lie dictates otherwise. For example, during road projects, frequently a utility is required to make temporary relocations of overhead or underground lines and must later move the facilities to their permanent location:

- In the summer of 1995, one of the NEES Companies was required to relocate approximately 3 miles of pole line along Route 1 in Massachusetts as part of a highway project. Recently, the same company received notice that this same line must be relocated again in the spring of 1997 as part of further highway work.

Thus, utilities cannot always control when and how often attachments will be made, particularly if a governmental entity controls the land occupied by the facilities in question.

**D. Notice Requirements Should Not Hamper the Provision of Electric Service or Local Competition in Telecommunications.**

Limits on the frequency of modifications to utility infrastructure and a long notice requirement would hamper the ability of a utility to respond to its customers and slow the introduction of facilities-based local competition in telecommunications.

A limit on the frequency of modifications to facilities would prevent an electric utility from meeting its service obligation where a facility has been modified to accommodate a telecommunications carrier. A limit on the frequency of modifications to facilities would also serve as an effective barrier to telecommunications competition by putting a moratorium on further

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<sup>2</sup> Second Comments of Teleport Communications Group, Inc., Docket 96-98 -- Local Competition NPRM, Page 11.



modifications to accommodate additional telecommunications carriers. For example, a pole that has been replaced, for whatever reason, including to accommodate a telecommunications carrier, could not be further modified to accommodate a second telecommunications carrier, effectively blocking the second carrier's entry to the market. A long notice period requirement would have similar effects both for electric utilities and for telecommunications carriers.

There is a logical inconsistency in certain comments made to the FCC with regard to notification of modification of attachments. For example, one commenter demands that "an application should be processed and physical access provided in thirty days or less,"<sup>3</sup> a notice period of "no less than twelve months"<sup>4</sup> should be required and a limit placed on modifications restricting them to no "more than one time in any two year period"<sup>5</sup>. Thus, electric utilities would be required to accommodate a telecommunications carrier within 30 days and then be prohibited from making further modifications to accommodate that carrier, or any other, telecommunications carrier for at least 12 to 24 months. This approach should not be adopted. The Commission's policies should be crafted to permit parties to negotiate their own attachment terms, or, if the FCC decides to establish rules, such policies should establish fair and reasonable ground rules for notifying attaching parties of modifications to facilities.

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<sup>3</sup> *Id.* at 10.

<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.* at 11.

**II. The Existence of Available Capacity Must Be Addressed on a Case-by-Case Basis.**

The suggestion that there can be a predetermined standard, applicable to all situations, to be used in deciding whether safety, engineering and other concerns allow access to a particular electric facility has little relation to the realities of managing a large electric utility infrastructure. The vast experience of electric utilities in this area has shown that it would be difficult, if not impossible, for any regulating body to attempt to regulate conditions of attachment which it has not seen, and such attempts could only lead to potential dangers to workers and the public at large with respect to poles, conduits and other infrastructure, as well as threats to the safety and reliability of the supply of electricity to the public.

A rebuttable presumption that sufficient capacity exists for access to all poles, ducts, conduits and rights-of-way would be not only unreasonable, but dangerous. The average pole owned by the NEES Companies is 33 years old. The cable television industry has been in existence for about 25 years. Most existing cable television system attachments were therefore made to poles installed before any capacity was being provided for these attachments. To presume that sufficient additional capacity exists for access to all poles, ducts, conduits and rights-of-way is inherently dangerous to public safety and to reliable electric service. This latter issue is reflected in recent reports that utility poles overloaded by cable television attachments were a contributing factor to widespread interruptions of vital electric service in Pacific Gas & Electric Company territory in California in December 1995.

While the NEES Companies recognize the importance of encouraging the development of a telecommunications infrastructure and support this goal, the fact remains that taking other than a

case-by-case approach to access issues would be extremely unwise. Moreover, should telecommunications service providers be allowed on electric facilities without a case-by-case determination, there would be a risk that those providers would attach before a full hearing on the utility's objections--as cable television systems have done in the past. Such action would make reversing the attachment difficult, if not impossible.

**A. Electric Utilities Are Best Situated to Determine the Availability of Access.**

Electric utilities have extensive experience in routinely grappling with analyses of the impacts of attachments to their facilities, considering such diverse issues as climate, age of infrastructure, the nature of the attachment, and national, state and local safety codes and construction standards. This vast experience makes electric utilities the natural candidates to continue to judge the suitability of attachments for a particular location. Any objection to an attachment capacity, safety, reliability, or engineering determination by a utility may be properly addressed in a complaint procedure.

**B. The Determination of the Availability of Access Is Based upon Numerous, Case-Specific Factors.**

The argument that an FCC-established access standard for safety and engineering considerations could be applied nationwide is specious for many reasons. First, state and local regulations affecting attachments vary, and the Telecommunications Act of 1996 requires the FCC to respect these regulations. Second, electric utilities already follow recognized standards in reviewing the capacity and safety of their facilities.

**1. State and Local Construction and Safety Standards Vary and Should Not Be within the Purview of Federal Regulation.**

Utilities must adhere in many cases to state and local standards in determining the safety of their facilities and attachments thereto. No nationwide standard could take into account all such state and local considerations, and therefore an attempt to do so would likely run afoul of the states' legitimate rights to regulate the safety of their citizens and the safe and reliable supply of electricity. The Telecommunications Act of 1996 recognizes those rights and the FCC should not act in a contrary fashion in promulgating "cookie cutter" federal regulations.

**2. Electric Utilities Already Follow Recognized Standards in Reviewing the Status of Their Facilities. There Are also Company Standards That the Utility Follows.**

When electric utilities review the status of their facilities, either in the course of their regular operations, reacting to an emergency, or in response to an attachment request, they must consider a multitude of diverse factors, including: capacity and condition of the facilities involved; existing attachments; and weather conditions to which attachments will likely be exposed (such as heavy snow, ice, wind, and rain) to determine loading conditions. In reviewing all of these factors, electric utilities already follow recognized industry standards in examining the structural integrity and electrical safety of their facilities, including those of the NESC, NEC and ANSI, contrary to the assertions of some of those responding to the FCC's *NPRM*. Applicants for access to utility infrastructure are not left to the whims of the utility, as some of those commenting would suggest, but instead are subject to the detailed analyses of engineers faced with the task of ensuring the safety and reliability of facilities and their compliance with these recognized standards.

Electric utilities also follow company standards. Industry standards serve as guidelines for many different types of safe construction of facilities. Company standards address issues of reliability, operability, maintainability and economics not addressed in industry safety standards. Utilities must select specific designs, materials, construction, and maintenance practices from among all of the possible variations. In doing so, the electric utility ensures that it can have trained personnel, equipment and materials available to maintain, repair and operate the shared facilities for the benefit of all attached parties.

The Commission should not place upon the utility an additional burden of proving that a party seeking access to its facilities cannot safely do so, or cannot do so consistent with the utility's legitimate engineering and planning concerns. Rather, the parties should be permitted to resolve those issues in a negotiated process, where both parties can address engineering and other safety concerns. Certainly the Commission should not adopt a burdensome procedure that could result in overloaded poles, crowded conduits, and other circumstances at odds with good utility practice to the detriment of public safety.

**C. Any Doubts Regarding the Availability of Access to the Facilities of an Electric Utility Must Be Resolved in Favor of the Utility's Determination, and Thus the Utility's Ratepayers.**

While new telecommunications industry entrants challenge their obligation to pay their fair, full share of costs associated with their use of electric utility poles and conduits, they nonetheless have forcefully insisted on their "right" to such access. In fact, notwithstanding their payment of some of the "carrying costs" associated with pole attachments, it is the local electric ratepayers who have made possible the construction of those facilities, and who, even under the 1996 Act, would

still may pay at least part of the costs related to telecommunications uses. These ratepayers are entitled to the continued safe and reliable supply of electricity, and such safety and reliability must not be threatened by the actions of telecommunications providers who seek access to the facilities providing vital electricity without recognizing the legitimate concerns of those whose electricity comes via those facilities, and the utilities who maintain those facilities.

Similarly, while some telecommunications providers have objected to electric utilities reserving capacity for their current and planned electricity-related uses, it would be unfair to require ratepayers to pay again and, most likely, more than they paid previously, to build structures to replace capacity that they did not fund, but which were taken over by carriers who did not and will not pay their fair and full share of costs associated with those facilities' construction and maintenance.

For these reasons, any doubts regarding access must be resolved in favor of the electric utility's determinations. At the very least, such issues involving facilities serving local ratepayers must be resolved at the local level, and not via some federal regulatory scheme.

### **III. Access to Rights of Way, Poles, and Conduits Must Be Consistent with Real Property and Contract Law, and Legitimate Concerns of Local Jurisdictions.**

In their zeal to rapidly build infrastructure for their benefit on electric utility-owned or controlled poles, conduits, and rights-of-way, several responses to the FCC *NPRM* focused on getting what could only be described as "universal" access to those assets. In fact, the clear, plain language of the 1996 Act only refers to "nondiscriminatory access." Where the utility has no rights

of access to give, or is otherwise restricted by the private agreements it has with landowners, it's only recourse may be to deny, on a nondiscriminatory basis, such access.

**A. Access Should Only Be Required for Public Rights of Way and Street License Areas and Not Private Easements.**

For simplicity's sake, it can be said that there are two basic instances in which a utility has placed its facilities, or has the right to place its facilities, on property it does not own. The first instance is where there has been a state or municipal grant of a right-of-way. Subject to a review by the utility of its safety, reliability, and planning concerns, consistent with applicable laws and regulations, the telecommunications provider seeking access may effectively argue that access should be given to such public rights of way and streets subject to street licenses.

Even in this instance, however, there may be strong, legitimate concerns by state and local authorities with the types and amounts of facilities placed in an area subject to a public grant, whether for safety, aesthetics, or other reasons. The FCC should give broad latitude to these authorities in regulating access to these areas, consistent with the 1996 Act.

**B. Private Easements Are Rights Negotiated by Utilities for the Utilities' Needs and Contracts between Landowners and those Utilities and Therefore Cannot Be Subject to Access Mandates.**

The second instance in which a utility will have access to land it does not own is by a private negotiation between the utility and a landowner. It is not surprising that, as evidenced by their comments, many telecommunications providers want unrestricted access to property that neither they nor the utility owns.

In this second instance, however, the relationship between the property owner and the utility is governed by a private contract, an easement, granted to the utility. The utility has negotiated and paid for these rights, and is itself bound by the terms of the contract. It can grant to a non-party to the contract no more rights than it itself is given. It is difficult to imagine many (if any) easements which would allow the utility to grant rights to third parties, other than to affiliates, or as necessary in carrying on its business. Accordingly, requiring utilities to provide access to such third parties may, at the very least, have no force and effect and, at the most, infringe on the rights of the landowners.

**C. Forcing Third Parties onto Private Property Risks Overburdening the Existing Easement**

Perhaps the greatest danger in attempting to allow telecommunications providers access through utilities' easements on private property is the risk that the increased use of the landowners' property, or the threat thereof, could be seen as "overburdening" the easement. Such a determination, or even the prospect of an overburdening claim, could threaten the continued viability of the utility's easement and its ability to negotiate easements with private landowners in the future.

While the NEES Companies support the intent of the 1996 Act in fostering telecommunications competition, the implementation of the 1996 Act must not interfere with both existing contractual and property rights, nor should it do harm to the essential service provided by electric utilities. The Commission should not permit electric utilities and their customers to have the integrity of the electrical supply system jeopardized by the inability to plan, build and maintain infrastructure on private property.



**D. States Have Legitimate Concerns with Private Land Use That Should Not Be Overlooked or Supplanted by Federal Regulation.**

Lastly, in considering regulations relating to access to private property, the FCC should recognize the concerns that states have with the use of private land within their jurisdiction-- concerns that relate to local issues and that do not lend themselves to the broad brush of national resolution. The FCC should not implement the 1996 Act in an overbroad way, by abrogating state, county, and local rules in a manner that prevents officials from addressing the concerns of their citizens.<sup>6</sup> By leaving this issue with state officials, the FCC would be acting consistent with the Communications Act of 1934, as amended by the 1996 Act, in deferring to the states' ability and right to regulate access to property within their jurisdictions.

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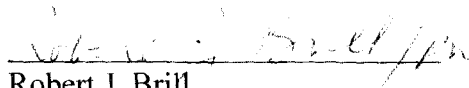
<sup>6</sup> The Commonwealth of Massachusetts, for example, has recognized concerns relating to attachments to high voltage transmission facilities and therefore expressly bars, by law, attachments by outside parties to those facilities. G.L. 166, § 25A.

**IV. Conclusion**

The NEES Companies therefore respectfully request the Commission to implement the 1996 Act in a manner that protect the integrity and safety of electric utility service. Parties should be encouraged to negotiate facilities agreements, including requirements for notice of modification. Any rules adopted requiring such notice should be reasonable, and include exceptions for emergency situations. Capacity issues also should be addressed on a case-by-case basis. In addition, any regulations regarding access to rights-of-way should take into account state and local property laws and contractual rights of affected parties.

Respectfully submitted,

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